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JOHN F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A.,

Petitioner,

vs.

FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America,

Respondents.

PETITIONER'S REPLY BRIEF

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Preliminary*

The answering briefs of the Superintendent of Banks ("Superintendent") and of the United States ("CCC") fail to meet the issues raised in the petition. The central issue here is whether the procedures utilized by the New York Courts in confirming the settlement between the Superintendent and the CCC afforded due process to petitioner, Intra Bank S.A. ("Intra").

The Superintendent concedes the existence of this federal question (Br. p. 9). In effect the Superintendent by

* Figures in parentheses refer to pages in printed record on appeal to New York Court of Appeals unless otherwise indicated.

his silence appears to concede that this federal question is an important one.

The Superintendent's resistance to the petition seems to be

(1) the New York courts were adequately informed despite the failure to hold an evidentiary hearing because Special Term said so (Br. p. 10); and

(2) two of the four basic issues referred to in the petition herein may be disposed of without additional evidence (Br. p. 13).

I

Special Term was misinformed and uninformed.

In its original opinion (Appendix A, p. 30a), Special Term said that it had apprised itself of all necessary facts. No such statement appears in its opinion on reargument (Appendix A, pp. 15a-25a).

The accuracy of Special Term's statement in its original opinion can be gauged by the obvious errors and omissions of fact therein, to wit:

1. CCC was not aware that Branch would obtain the funds under the letters of credit as soon as the commodities were shipped (Appendix A, p. 39a). In fact, CCC was fully aware (470-1, 445).

2. The moneys received by Branch were transferred to Beirut without the knowledge or consent of CCC (Appendix A, p. 39a). In fact, CCC was fully aware of the transfer and consented thereto (470-1, 445).

3. Intra, in Beirut, received such moneys for its own account (Appendix A, pp. 35a-9a). In fact, they were received by Intra in a blocked account in the name of the Lebanese importer (443-4).

4. The 36-month credit provision of the letters of credit was invalid (Appendix A, p. 39a). CCC expressly conceded to the contrary (471).

5. "The result reached herein conforms to one's natural sense of fairness and equity. There can be little question but that, as between CCC on the one hand, and shareholders of Intra N. Y. and creditors who claim in subordination to them on the other hand, the claim of CCC is superior." (Appendix A, p. 53a). Intra was reorganized in Lebanon (447, 217-30, 457-61) and the controversy is between creditors of the New York Branch and all creditors.

6. There is no finding as to the value of what CCC is receiving. CCC will receive all assets not needed for the payment of other creditors of Branch[1]. There is no evidence as to the value of all such assets.

II

Issues as to the effect of the Beirut Protocol should be resolved by a plenary hearing.

The CCC has completely misconceived the thrust of the petition (Br. pp. 8-9). The Superintendent correctly conceives the petition (Br. p. 13), but intimates that two of the four issues which petitioner says require additional evidence can be adequately determined on this record.

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[1] The Superintendent candidly admits that the "essential feature" of the compromise is simply that it enables New York creditors to be paid in full (Br. p. 4). At no point in this proceeding has the Superintendent given any recognition whatever to the equitable right of other creditors to be protected against abandonment by the Superintendent of the remaining New York assets to the CCC regardless of the merits of its claims.

The Superintendent contends that Intra was permitted to put into evidence whatever evidence it had to support its interpretation of the Beirut Protocol (Br. p. 13). There is no basis whatsoever for the contention that Intra exhausted all available evidence with respect to the protocol. Sufficient evidence was introduced by Intra to establish prima facie that the Beirut Protocol barred the compromise.

It is important to note that Intra's rights under the Beirut Protocol are not, and could not be, a subject of compromise between the Superintendent and the CCC. Intra's claim based upon those rights, having been duly raised as an equitable defense in this proceeding,[2] must be adjudicated. Regardless of the degree of certitude which may or may not be required for approval of a compromise, due process requires a plenary evidentiary hearing for resolution of issues of fact involved in this defense.

Conclusion

At stake here is the important federal question of procedural due process. The New York Courts have introduced far-reaching innovations in the law respecting settlement of claims.

The rights of foreign governments vis-a-vis the CCC have been determined without any proper judicial trial respecting the merits thereof. Petitioner does not contend that in approving compromises the Courts must weigh the merits of the claim with the nicety of an apothecary's scale. Petitioner contends, however, that there must be an adequate basis for any weighting and that basis is not pres-

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[2] The Superintendent's suggestion (Br. p. 13) that Intra's only recourse is an action for damages against the CCC is so plainly contrary to basic equitable principles as to require no comment.

ent here and procedures utilized by the New York Courts were not adequate or proper to accomplish any fair weighing at all.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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